

RUPENI NAVUNISARAVI

v

- A
1. PRADEEP KUMAR
 2. RAJA RAM

[HIGH COURT, 1994 (Pathik J) 31st March]

Civil Jurisdiction

- B *Negligence causing death-young child-assessment of damages-Law Reform (Miscellaneous Provisions) Act (Cap 27) - Compensation to Relatives Act (Cap 29).*

In assessing damages the High Court considered the nature of a claim in respect of a child's death and the appropriate quantum of damages both general and special.

- C Cases cited:

Barnett v Cohen & Others [1921] 2 KB 461

Blake v Midland Rly Co (1852) 18 Q.B. 93

Buckland v Guildford Gas Light and Coke Co [1949] 1 KB 410

Davies & Anor v Powell Duffryn Associated Collieries Ltd [1942] AC 601

- D *Dhapel v Arjun* 8 FLR 74

Fletcher v Autocar and Transporters Ltd [1968] 2 Q.B. 32

Franklin v South Eastern Rly Co (1858) 3 H & N 211

Gauri Shankar v Modern Land Development Co Ltd (H. C. West. Div. 335/83)

Hicks v Chief Constable South Yorkshire Police [1992] 2 All ER 65

- E *Kesi Ganikeli Liva v Mahendra Pal Chaudhary* (S/C C.A. 391/79)

McCarthy v Palmer (1957) NZLR 442

Public Trustee v Bednarczyk (1959) SASR 178 at 180

Shiu Shankar v Madhwan & Anor (Sup Ct. Ltk C.A. 31/74)

Wahen v Vernon (1970) RTR 471

Waldon v War Office [1956] 1 WLR 51

- F Assessment of damages in the High Court.

Ms G. Phillips for the Plaintiff

R. Chand for the Defendants

Pathik J:

- G This action is brought by the Plaintiff Rupeni Navunisaravi under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27 and also under the Compensation to Relatives Act Cap. 29 to recover damages for the death of his son Saimoni Vuatalevu Navunisaravi (hereafter referred to as "the

deceased") through the negligence of the first defendant. He sues as Administrator under Letters of Administration granted to him by High Court of Fiji on 13 May 1992. He states that he brings the suit for his own benefit and for the benefit of Tubuna Bose the deceased's mother, Vani Namerua Navunisaravi the deceased's sister, Naibuka Tuilomani and Rupeni Navunisaravi the deceased's brothers.

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The deceased died on 24 November 1991 at the Colonial War Memorial Hospital, Suva. He was then about 8 years of age and lived with his parents.

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The First Defendant (D1) was at all material times a servant or agent of the Second Defendant (D2). The D2 was at the material time the registered owner of Toyota Liteace motor vehicle Registered No. BU489.

On or about 24 November 1991 at Kings Road, Davuilevu, Nausori the D1 acting as a servant or agent of the D2 drove the said vehicle so negligently and unskilfully that he caused or permitted the said vehicle to collide with the deceased who was at the time walking on the unpaved footpath on the side of the road.

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The D1 was prosecuted and convicted for causing death by dangerous driving on 23 March 1992 and was sentenced to imprisonment for 15 months which was suspended for 18 months and also fined \$150 in default 6 months imprisonment.

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As a consequence of the accident the deceased sustained serious personal injuries resulting in his death on the same day.

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No Notice of Intention to Defend having been given by the defendants, Judgment in Default was given against them.

Although Mr. Ram Chand was to be appointed the solicitor for the defendants this did not happen and the hearing of assessment of damages proceeded to hearing before me when I was the Chief Registrar on 12 November 1992. The D1 was present but D2 (the father of D1) was not present. I ordered that written submissions be filed by Plaintiff by 2 December 1992. Mr. Ram Chand for the defendants appeared on 27 January 1992; after further appearance by counsel on 24 March 1993 I extended time for written submission till 21 April, 1993. There were numerous adjournments after that by the Deputy Registrar on the application of counsel until finally the Plaintiff filed his submission on 8 September 1993 and the defendants on 13 January 1994.

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I commenced to assess damages as Chief Registrar but was no longer in that post by the time the submissions were filed. Now I assess damages in this action in my present capacity.

FACTS AND EVIDENCE ADDUCED

A The evidence so adduced has been well summarized by the learned counsel for the Plaintiff and I adopt them here as hereinafter appearing:

B “Dr Eka Buadromo in evidence stated that she examined the deceased shortly after his admission to CWM Hospital on 24 November 1991. She conducted the post-mortem examination. Her evidence outlined the extensive internal and external injuries which were consistent with the deceased being hit by a motor vehicle. The doctor stated that the deceased would have experienced great pain and suffering prior to death. But for the injuries sustained by the deceased from the accident, the doctor stated that she found no signs of latent illnesses or other physical deformities on the deceased. He was for all intents and purposes a normal healthy child prior to 24 November 1991.

C Mr Naibuka Navunisaravi in evidence stated that the deceased was one of his grandchildren and that he had resided in the same residence as the deceased throughout his life except for 1984. He stated that the deceased was a hard working and very bright young boy, who was an example to the witnesses’ other grandchildren who were the brothers and sister of the deceased. The deceased before his untimely demise was a healthy and active young boy.

D He confirmed that the deceased who was eight years old at the time of death, was the second eldest child of the plaintiff herein and that the immediate family of the deceased still experience the trauma and deep loss as a result of the unexpected death of the deceased.

E The witness in evidence stated that funeral expenses included the sum of \$1000.00 being for the purchase of two cows, the purchase being for catering for the bereavement gathering (regu regu). Further expenses included transportation costs, and other related funeral expenses. The approximate funeral expenses being \$1500.00.

F Mrs. Salote Koroi in evidence stated that she taught the deceased whilst she was assistant Head Teacher at Draiba Fijian School in Suva. She described the deceased as being at the time she taught him, “a little gentleman”.

G Also that he was a very successful student both inside and outside the classroom. The deceased was also the class leader at the time he died. This witness confirmed that she had thirty years in the teaching profession and in her professional opinion was of the view that the deceased had the makings of a very good citizen.

Mr Rupeni Navunisaravi the plaintiff stated that he was the father

of the deceased and had been granted Letters of Administration in respect of the estate of the deceased on 13 May 1992. He further stated that Tubuna Bose (deceased's mother), Vani Namerua Navunisaravi (deceased's sister), Naibuka Tuilomani and Rupeni Navunisara (deceased's brothers) are the beneficiaries of the deceased's estate. The plaintiff confirmed the emotional loss still felt by the family as a result of the untimely death of his son".

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THE CLAIM

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The Plaintiff brings his claim under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27 and Compensation to Relatives Act (Cap. 29) and it is as follows:-

- (a) Damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act for loss of expectation of life.
- (b) Damages under Compensation to Relatives Act.
- (c) Special Damages in the sum of \$1500.00 (one thousand five hundred dollars) being for funeral expenses.
- (d) Costs.

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I shall now deal with the claim in the same order as above.

(a) DAMAGES UNDER COMPENSATION TO RELATIVES ACT

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The right of action under the compensation to Relatives Act (Cap. 29) confers on the near relative a right which is an independent right and not a continuation of the cause of action vested in the deceased.

The Act provides that every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused (section 4). The word "parent" has been defined under the Act to include father and mother. Here the action has been commenced by the Plaintiff as Administrator of the Estate on behalf of himself, the deceased's mother, deceased's sister and two brothers which, in my view is wrong. It should only be for the benefit of the parent which includes the father and mother of the deceased under the Act in his case.

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An action is maintainable as provided for under section 3 of the Act which reads as follows:-

"Where the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as

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- would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person or persons or body of persons, incorporated or unincorporated, who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death was caused under such circumstances as to amount in law to a crime.”
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- B Under s.4 of the Act (Cap. 29) the Plaintiff is entitled to the claim as a dependent for himself (as father) and his wife (the deceased’s mother).
- The action is based upon financial loss or loss of support and nothing else; it gives no solatium for mental distress... (Blake v Midland Rly Co (1852) 18 Q.B. 93). In this case the deceased died the same day, hence no claim for pain and suffering arises as no damages is given for pain and suffering when unconsciousness and death followed the injury within a very short time (Hicks v Chief Constable South Yorkshire Police [1992] 2 All ER 65).
- C
- D Loss of support, to some degree, is an essential element of the cause of action. None of the relatives can succeed unless they can prove actual dependence on the deceased at or before his death, or a probability that they would have received some support from him in the future if he had lived. A total dependence is not necessary, and partial dependence, even if it is of a slight and uncertain kind, will be sufficient to sustain an action, although the difference between the two cases will necessarily be reflected in the amount of the damages.
- E It is not necessary for the Plaintiff to prove that he had a right to support by the deceased: what he must establish is, ‘a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life’ (Franklin v South Eastern Rly Co (1858) 3 H & N 211).
- F Under the Act (Cap. 29) I have to decide the amount of dependency of the parent in the case of the deceased and then a suitable multiple has to be determined.
- In this case I am dealing with a case in which the deceased was just about 8 years of age at the time of his death on 24 November 1991.
- To determine the degree of dependency in such a case is very difficult indeed.
- G The only guidance one can get is from awards in previous cases. It has been held in Waldon v War Office (1956) 1 WLR at 51 that:
- “Although a judge is not bound to hear references to such cases, he may do so. He has a discretion to decide whether in his view the reference to such other cases would or would not assist him.”

The learned counsel for the Plaintiff is well aware of the difficulties that the Courts face in assessing damages and she has very properly drawn the Court's attention to the observation of judges in some of the cases.

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In Waldon (supra) at 55 Singleton L.J. said:-

"A judge in assessing damages draws upon his own experience. Where does he get that experience? From knowledge of other judges' decisions as to amount; from knowledge of what is said in this court and in the House of Lords; and from his ordinary experience in life... The judge realizes that his task is to assess damages in the particular case before him, and upon the evidence before him and upon nothing else. If he can get help from decisions of other judges, or from this court, I am inclined to think that in his discretion he might well accept it. It is for him to judge."

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In Fletcher v Autocar and Transporters Ltd [1968] 2 Q.B. 32 Salmon L.J. stated at 363 - 364:-

"On the other hand, the full amount of perfect compensation manifestly cannot be given for pain and suffering or loss of amenities for the simple reason that, in the nature of things, there can be no perfect compensation in relation to such matters To my mind the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant, but would consider them to be sensible and fair in all the circumstances."

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It is not that damages are not awarded in the case of a child. A case of where the Plaintiff Arjun was entitled to damages for negligence where death ensued was Dhapel v Arjun 8 FLR 74. This case involved a boy aged 13 ½ years. The case was remitted to the Magistrate's court for assessment of damages.

In Barnett v Cohen & Others [1921] 2 KB 461, the deceased was four years of age. There McCardie J. said at 469 that:

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"the plaintiff's claim to damages must rest in substance upon his anticipation of the future services and help or the pecuniary aid in the future of the son, who at four years of age is now dead."

He further said that nothing can be given by way of solatium for the injured feelings of the relatives and all that can be dealt with or assessed is pecuniary loss. Hence it has been rightly argued by Mr. Ram Chand that claims for emotional loss, loss of friendship and companionship and loss of pride in deceased's accomplishments cannot be taken into account nor allowable in assessing damages. It has been so held by the Supreme Court in McCarthy v Palmer (1957) NZLR 442 where in the headnote it is stated:

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- A “A claim under the Deaths by Accidents Compensation Act 1952, on behalf of the widow and children as the result of the death of the husband and father, for damages in respect of the loss of the society, care, guidance and affection of the husband and father respectively, discloses no cause of action under the statute, since damages are recoverable thereunder by members of the family only to the extent of the loss of presumed advantage by the persons for whose benefit the action is brought.”
- B

It has been the practice of the Courts to grant a very nominal sum as damages where deceaseds are infants of tender age and are not in any employment.

- C The case of Buckland v Guildford Gas Light and Coke Co [1949] 1 KB 410 involved the deceased, a girl aged 13. She was a bright intelligent girl competent to look after a younger child aged eight. There Morris J in awarding the sum of £200 (after assessing the damages under the Fatal Accidents at £500 and reducing them to £200 taking the Law Reform into account) observed:

- D “She assisted her parents in the home and it was anticipated that her gifts would later have enabled her to contribute financially as well as by services to the household. The extent to which she could and would have done so must be considered with due regard to all the chances and changes that might have affected her and also her parents.”

- E In Ellis v Ocean Steamship Co Ltd (1958) 1 Lloyd’s Rep. 471 in the case of the deceased aged 17 years when killed, the sum of £108 was awarded on a multiplier of 3.

In Wahen v Vernon (1970) RTR 471 the sum of £500 was awarded in the case of the deceased who was 17½ years of age at the date of his death and who earned £6.50 per week as an apprentice.

- F In an unauthenticated award referred to in KEMP & KEMP Vol 3 M6 - 076 in Spitalali v Washbourne (1975) Richards J awarded the sum of £800 in the case of the deceased aged 14. In the report to that case (supra) it is stated thus about the deceased:-

- G “Came from Sicilian family consisting of his parents, who were now both aged 49, himself and three sisters (one of whom had now married). Happy and healthy boy. Had done well at school and likely that, when he completed his education, he would have achieved standard which would have enabled him to obtain job of considerably higher status than that done by his father, who was a machine cleaner. If he had lived and once he had gone to work, he could well have contributed towards cost of family visits

to Sicily. Would probably have supported parents if they fell on bad times due to failure to obtain work or ill health, as was the custom in Sicilian families.”

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In the case of a youth aged 18 years unmarried and unemployed Dyke J. awarded \$1250.00 (Gauri Shankar v Modern Land Development Co Ltd (High Court [Western Division] C.A. 335/83).

In the present action, doing the best I can bearing in mind the principles to be applied in cases of this nature and after being guided by the cases to which I have made reference I am satisfied that the Plaintiff had a reasonable expectation of pecuniary benefit. The deceased no doubt was very young but in my view at about 16 years of age he would have been of assistance to his parents. He would have contributed part of his future earnings to his parents for the upkeep of the household. No doubt he would have married in due course and his contribution to his parents then would have reduced considerably. In this case I would fix the multiplier at 9 worked out on the basis that from the age of 16 years he would have contributed until 25 years of age (when he probably would have married) the sum of \$8 per week i.e. \$416 per year for 9 years making a total of \$4044. There is paucity of cases to fall back on in assessing damages in the case of minors and as McCardie J said in Barnett v Cohen (supra) the whole matter is beset with doubts, contingencies, and uncertainties; however, I consider that I ought to assess and make an award which in my considered view would be reasonable in the circumstances of this case.

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In the circumstances I award the said sum of \$4044 under this head; there will therefore be judgment for the Plaintiff in the said sum.

(b) DAMAGES UNDER THE LAW REFORM
(MISCELLANEOUS PROVISIONS)
(DEATH AND INTEREST) ACT

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Under this head for loss of expectation of life I assess it at \$1000.00.

Following the decision in Davies & Anor v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 this award will merge into the award under the Compensation to Relatives Act.

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(c) SPECIAL DAMAGES

The special damages claim relates to funeral expenses.

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Although there is no definition of ‘funeral expenses’ in Cap. 29 it provides in s.11 that “damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought”; it would appear therefore that the test of reasonableness would apply.

A Some indication of what the word “funeral” is usually taken to comprehend has been stated by Mayo J. in Public Trustee v Bednarczyk (1959) SASR 178 at 180 (quoting from LUNTZ on Assessment of Damages 3rd Ed. p. 439) as follows:-

B “The word ‘funeral’ is usually taken to comprehend the disposal of human remains, including accompanying rites and ceremonies, that is to say, the procedure of, and appertaining to, burial or cremation, in the course of which the body is prepared for burial and conveyed by cortege to the necropolis. Such initial stages as acquisition of burial plot, public notice, obtaining a certificate of death, permission to cremate or bury, will form part of the procedure and the cost will be funeral expenses.”

C According to custom there are certain expenses, such as in this case, for the “reguregu” that one cannot avoid and it certainly is part of the expenses relating to the funeral of the deceased. In the Fiji context, bearing in mind the traditional Fijian ceremony associated with the funeral I will allow a reasonable sum under this head. In Kesi Ganikeli Liva v Mahendra Pal Chaudhary (Supreme Court C.A. 391/79) the then Chief Registrar (now Scott J) awarded the sum of \$1500 for funeral expenses; and in Shiu Shankar s/o Chunni v Madhwan & Anor (Sup Ct. Ltk C.A. 31/74) Dyke J stated that “religious rites following the death of a Hindu person are reasonable and the claim under this head is allowed”.

I award the sum of \$1500 for funeral expenses as special damages.

CONCLUSION

E In the result I allow the sum of \$4044 under Compensation to Relatives Act (Cap 29) and \$1000 under Law Reform (Miscellaneous Provisions Act) (Death and Interest) Act (Cap. 27). The sum of \$1000 under Cap. 27 falls to be deducted from Cap. 29 following the decision in Davies (supra). The total award therefore is \$4044 which falls for distribution. To this award is to be added the sum of \$1500 as special damages.

F I therefore give judgment for the Plaintiff against the defendants in the sum of \$5544.

The said sum of \$4044 is to be divided equally between the Plaintiff (as the father) and the deceased’s mother.

G The funeral expenses is allocated to the Plaintiff as the father.

I award costs against the Defendants which are to be taxed if not agreed.

(Damages assessed.)